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The World Health Organization and the challenge of sharing administrative powers

A Organização Mundial da Saúde e o desafio do compartilhamento de poderes administrativos

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Abstract: The WHO's management of the pandemic has drawn sharp criticism. It has been suggested that there is an urgent need for a reform providing more intrusive administrative powers. By contrast, this paper argues that the WHO needs sharing powers rather than intrusive powers. Given that the main international norms have arguably designed the WHO as a "non-authoritarian" authority aiming at the highest possible level of health of individuals, the paper suggests that the sharing of administrative powers be incentivized through the participation in proceedings of all institutional actors involved in emergency management.

Keywords: World Health Organization. International Health Regulations. Public Health Emergency of International Concern. Emergency. Administrative powers.

Resumo: A gestão da pandemia pela OMS atraiu fortes críticas. Foi sugerido que há uma necessidade urgente de uma reforma que forneça poderes administrativos mais intrusivos. Por outro lado, o presente artigo argumenta que a OMS precisa compartilhar poderes em vez de poderes intrusivos. Dado que as principais normas internacionais indiscutivelmente projetaram a OMS como uma autoridade "não autoritária" visando ao mais alto nível possível de saúde dos indivíduos, o artigo sugere que o compartilhamento de poderes administrativos seja incentivado por meio da participação nos processos de todos os atores institucionais envolvidos na gestão de emergências.

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Contents: **1** Introduction – **2** Organization and activity – **3** Administrative powers – **4** Conclusion – References

1 Introduction

The recent pandemic was the most severe emergency that the World Health Organization (WHO) has faced since its foundation.[1] Though the global health authority had addressed significant flu pandemics with SARS and H1N1, the unprecedented challenges of covid-19 brought long-hidden weaknesses to light.

Scholars of International Law have raised a variety of criticisms, focusing essentially on the WHO's lack of transparency, its slow response to the spread of outbreaks, the lack of political cooperation, the "light touch" approach to the Chinese government, and consequently the absence of sanctions for Member States.[2] Basically, scholars agree that there is an urgent need to reform the WHO and give on it more "intrusive powers".[3]

While these concerns are legitimate and well-founded, they do not seem to take due account of the current architecture of administrative powers as reflected in the international legal system.

This paper argues that the main sources of International Law –the Constitution of the World Health Organization (hereinafter the "Constitution") and the International Health Regulations (IHR)– have not designed the WHO as an authority that can exercise its administrative powers in an authoritarian and unilateral manner.[4]

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1 See HORTON, R. *The covid-19 catastrophe*: what's gone wrong and how to stop it happening again. 2. ed. Cambridge; Medford: Polity Press, 2020. p. 9 and 50, which emphasizes that the covid-19 pandemic is one of the most catastrophic events since the Second World War.

2 See Section 3, under footnotes 30-34, 38.

3 See GOSTIN, L. O.; WILEY, L. F. *Public health law*: power, duty, restraint. 3rd ed. Oakland: University of California Press, 2016. p. 11-12. Gostin argues that the theory of public health law often poses a paradox. The government is called upon to act effectively in order to promote the health of the people. To many, this role demands robust measures to address health risks. However, the government shall not unreasonably infringe upon the rights of individuals on account of the common good. Health regulation that exceeds, in the sense that it achieves a minimal health benefit with disproportionate human burdens, conflicts with ethical considerations and is not tolerated in a society based on the rule of law. Therefore, scholars often perceive a tension between the community's claim to reduce manifest health risks and the claim of individuals to be free from government interference. This perceived conflict may be agonizing in some cases and absent in others.

4 In this context, the term "non-authoritarian" refers to the exercise of power by an administrative authority like the WHO. Here "non-authoritarian" means that the WHO is required to use administrative power not in a unilateral and intrusive way, but in a multilateral and shared one, as foreseen by international standards (Constitution and IHR).

Rather, they have conceived the WHO as a democratic authority that seeks to provide the highest possible level of health for individuals through "sharing powers" policies with States Parties.

Section 2 will illustrate the WHO's main characteristics by providing an overview of its organization and activities, while Section 3 will explore the structure of administrative power accorded to it by international law. Section 4 concludes.

2 Organization and activity

The WHO and its regulatory policies were widely criticized during the recent emergency. We believe that this demonstrates the need for a better understanding of the WHO's architecture, at least in basic terms: though the criticisms are correct in the main, they have also failed to explain that the weaknesses of the WHO depend to a significant extent on the rules of its organization and activities.

Scholars have suggested that the WHO be reformed, providing it with more intrusive powers by giving binding force to administrative decisions towards States Parties. With this in mind, Section 2 outlines the main features of the WHO. It thus analyses the Constitution, as the main and most relevant document of International Law regulating this authority's organization and activities.

The WHO was founded in 1948 as a specialized agency of the United Nations and currently has a membership of 194 states.[5] At the central level, it consists of three organs, the World Health Assembly (hereinafter "Assembly"), the Executive Board (hereinafter "Board") and the Secretariat under the authority of the Director-General. At the decentralized level, it consists of regional bodies created by the WHO or incorporated from previously existing administrative entities.[6]

The WHO administrative organization, like other International Organizations (IOs), is designed to address public health concerns that States would struggle to tackle on their own.[7] Conceivably, the WHO came into being because Member States decided to cede some of their decision-making power in order to achieve common goals of

[5] On the WHO, see BURCI, G. L. *World Health Organization*. Alphen aan den Rijn: Kluwer, 2004. See also BURCI, G. L.; TOEBES, B. (ed.). *Research handbook on global health law*. Cheltenham: Edward Elgar, 2018.

[6] See RUGER, J. P. *Global health justice and governance*. Oxford: Oxford University Press, 2018. p. 247. Ruger argues that WHO has played a crucial role in coordinating global efforts to eradicate smallpox, handling international reporting, and managing the epidemic through the IHR. It has a unique coordinating function, deriving from its Constitution. Who is the only agency with the authority to develop and implement international law and health norms and standards and facilitate ongoing discussion among States Parties on priorities.

[7] In the doctrine of international law on IOs, see recently GAETA, P.; VIÑUALES, J. E.; ZAPPALÁ, S. International organizations. *In*: GAETA, P.; VIÑUALES, J. E.; ZAPPALÁ, S. (ed.). *Cassese's international law*. Oxford: Oxford University Press, 2020. See also KARNS, M. P.; MINGST, K. A.; STILES, K. W. *International organizations*: the politics and processes of global governance. Boulder: Lynne Rienner, 2015.

protecting and safeguarding public health at a global level.[8] Indeed, according to the International Law doctrine, as the "largest international health agency", it has "wide-ranging responsibilities to address global public health concerns".[9]

IOs exercise global governance only if and when Member States contribute to enabling them to do so: it is within the power of Member States to negotiate decisions on IOs' missions, delegate authority, set guidelines for their action and agree on policy, such as how to become members or observers, sources of funding, and rules of collaboration. Moreover, IOs are streamlined to deal with specific issues according to the policy of the Member States.[10]

Basically, IOs work with Member States to achieve common goals and, as a result, are accountable to them.[11] Even the WHO is designed by International Law with this rationale.

Looking at legal grounds, viz., the WHO Constitution (hereinafter "Constitution") which came into force on 7 April 1948, we can see that the main objective is "the attainment by all peoples of the highest possible level of health".[12] In turn, this "highest level of health" is defined by the Preamble as "a state of complete physical, mental and social well-being", and not merely the "absence of disease or infirmity".[13]

[8] The research field of global health law has recently integrated international health law. On this point, see the seminal book of GOSTIN, L. O. *et al*. *Global health law*. Harvard: Harvard University Press, 2014. Previously, for a definition of Public Health Law, see GOSTIN, L. O.; WILEY, L. F. *Public health law*: power, duty, restraint. 3rd ed. Oakland: University of California Press, 2016. *supra* note 3, p. 4. Gostin defines Public Health Law as "the study of the legal powers and duties of the state, in collaboration with its partners [...] to ensure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population), and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals. The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice".

[9] TAYLOR, A. L. International law and public health policy. *In*: HEGGENHOUGEN, K.; QUAH, S. (ed.). *International encyclopedia of public health*. San Diego: San Diego Academic Press, 2008. v. 3. p. 674. In particular, Taylor claims that the comprehensive nature of Art. 19 combined with Art. 1 gives the WHO "the legal authority to serve as a platform for [...] agreements that potentially address all aspects of national and global objective".

[10] KOREMENOS, B.; LIPSON, C.; SNIDAL, D. The rational design of international institutions. *International Organization*, v. 55, n. 4, p. 761-799, 2001.

[11] See NEGRI, S. International health law. *Yearbook of International Disaster Law Online*, v. 3, n. 1, p. 592-605, 2018. The Emergency Risk Management and Humanitarian Response Department of the WHO works closely with Member States, international partners, and local institutions to help communities prevent, prepare for, respond to, and recover from emergencies, disasters and crises. In 2016 the WHO's Health Emergencies Programme works with Member States and partners to manage and minimize the health risks associated with disasters. The Programme provides technical guidance and support and conducts operational and logistical missions in order to help countries to further develop key health components of risk management across all phases of the disaster risk management cycle. These components include governance, policy, planning and coordination; information and knowledge management; health and related services; and resources.

[12] Constitution of the World Health Organization, 22 July 1946, 14 UNTS 185, Art 1. The WHO's Constitution provides expansive legal authority in the field of global health standard-setting, starting with the mandate of Art. 1: the "attainment by all peoples of the highest possible level of health". In addition, the Constitution establishes that the Assembly "shall have authority to adopt conventions or agreements with respect to any matter within the competence of Organization".

[13] *Ibid*, Preamble.

Reflecting the political and social vision of the Charter of the United Nations, the Preamble of the Constitution also enshrines principles that underpin the happiness, harmonious relations and security of all peoples.[14] However, the doctrine of International Law notes that the highest standard of health is an aspiration rather than a political reality, as the goals of global and national health systems change as society evolves.[15] Yet, as we will see in Section 3, the governments of States Parties also play a decisive role in addition to the WHO.

Generally, the WHO is designed to manage global coordination to prevent the spread of diseases, especially pandemics. Hence, promoting knowledge on the prevention of diseases is a key role carried out through rules based on scientific knowledge. Consequently, the WHO faces a crucial challenge in assisting governments to strengthen health services, provide appropriate technical assistance and, in emergencies, offer the necessary aid.[16] For these purposes, the Constitution assigns the Assembly the functions of determining policies, research, and budgets as well as reviewing and approving reports and activities of the Board.[17]

The organization's staff of officials provides scientific and technical expertise, while political representation is ensured by delegates representing the States Parties. In this regard, the delegates of States Parties are "chosen from among persons most qualified by their technical competence in the field of health", and "preferably representing the national health administration of the Member".[18]

The WHO is in charge of leading and coordinating activities on health matters in the United Nations system. In particular, it provides guidance on global health issues, directs health research, and makes health policy choices based on the best scientific knowledge. Furthermore, it provides technical expertise to Member States, supervises and assesses health trends, finances medical research and supplies emergency aid in the event of an emergency.[19] It also contributes to improving the nutrition, housing, hygiene and working conditions of people around the world.[20]

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[14] On these points see BRUEMMER, E.; TAYLOR, A. L. Institutional transparency in global health law-making: the World Health Organization and the implementation of the international health regulations. *In*: BIANCHI, A.; PETERS, A. (ed.). *Transparency in international law*. Cambridge: Cambridge University Press, 2013. p. 275. See also GRAD, F. P. The preamble of the constitution of the World Health Organization. *Bulletin of the World Health Organization*, v. 80, n. 12, p. 981-982, 2002.

[15] See YI-CHONG, X.; WELLER, P. International organizations and state sovereignty: the World Health Organization and covid-19. *Social Alternatives*, v. 39, n. 2, 2020.

[16] WHO Constitution, Arts 1-2.

[17] *Ibid*, Art. 18 indents (*a*), (*f*), (*k*).

[18] *Ibid*, Art. 11.

[19] Recently, with regard to the pandemic, see MEIER, B. M. *et al*. The World Health Organization in Global Health Law. *The Journal of Law, Medicine & Ethics*, v. 48, n. 4, p. 796-799, 2020. DOI: 10.1177/1073110520979392. The authors claim that "[i]t will be crucial to reform global health law to prepare for future global health challenges, but WHO member states find themselves at a crossroads in their reforms: accept the divisive nationalist responses which have characterized the response to COVID-19 or recommit to international cooperation through global health governance".

[20] WHO Constitution, Art. 2 indent (*i*).

Administrative activity is outlined in Article 2 of the Constitution. It focuses on specific aspects of the coordination and management of health emergencies, as the major challenge that the WHO faces as an IO stems from its responsibility for eradicating epidemics.[21] More specifically, it acts as a coordinating authority to assist governments in strengthening health services and to provide appropriate technical assistance and support, as well as to establish and maintain administrative and technical services, including epidemiological and statistical services.[22]

In this context, the Assembly, while generally responsible for making "recommendations to Members with respect to any matter within the competence of the Organization",[23] is specifically entrusted with crucial activities like the adoption of regulations concerning sanitary and quarantine requirements to prevent the international spread of disease.[24]

Similarly, the Board is responsible for the crucial activity of taking emergency administrative measures to deal with events, such as pandemics, that require an immediate response.[25] It authorizes the Director-General to take the necessary administrative steps to combat pandemics, and to participate in the organization of health relief to the victims of a calamity.[26]

In outlining the main features of the WHO's organization and activities, we have learned a little more about how the WHO should function in responding to an emergency. The next step is to look at the role the WHO played in the recent pandemic. To this end, we will need to explore the administrative power accorded to it by the international legal system.

Not surprisingly, it has recently been argued that one of the main causes of the WHO's failure in managing the pandemic lies in its absence of "intrusive powers".[27] Nevertheless, claiming that achieving global health requires "intrusive powers" does not sound like a compelling argument. My point here is that an analysis of the legal context of the main international standards teaches us that the Constitution and the IHR see the WHO as an authority that is not equipped with coercive or "intrusive"

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21 For an overview see BEIGBEDER, Y. World Health Organization (WHO). *In*: WOLFRUM, R. (ed.). *The Max Planck encyclopedia of public international law*. Oxford: Oxford University Press, 2012. v. X. p. 928-930.

22 WHO Constitution, Art. 2 indents (*a*), (*d*), (*f*).

23 *Ibid*, Art. 23. On this point, see A L Taylor, 'International Law and Public Health Policy', *supra* note 5, 675. Taylor points out that the WHO in making recommendations and adopting regulations is "a fairly unique lawmaking device in the international system".

24 *Ibid*, Art. 21 indent (*a*).

25 *Ibid*, Art. 28 indent (*i*).

26 *Ibid*.

27 See, for example, BENVENISTI, E. The WHO-destined to fail?: political cooperation and the covid-19 pandemic. *The American Society of International Law*, v. 114, n. 4, p. 588-597, 2020. DOI: 10.1017/ajil.2020.66.

administrative powers, but rather with soft law powers. And this in order to avoid undermining the rights of persons.[28]

That is to say, I aim to show that the WHO does not need more "intrusive powers" but rather "sharing powers".

To do so, Section 3 will analyze the legal grounds of the WHO's administrative power, devoting attention to the main legal source of International Law governing its exercise, viz., the IHR.

3 Administrative powers

Though they are well known to all, we will nevertheless summarize here the main events relating to the outbreak of the covid-19 pandemic in order to understand the WHO's course of action.

On 31 December 2019, Chinese health authorities reported an outbreak of pneumonia cases of unknown aetiology in Wuhan. On 9 January 2020, China's Centre for Disease Control and Prevention (CDC) identified a new coronavirus as the aetiological cause of these illnesses. The Chinese health authorities also confirmed inter-human transmission of the virus.

On 30 January 2020, after the second meeting of the Emergency Committee, the WHO's Director-General, Tedros Adhanom Ghebreyesus, declared the international outbreak of coronavirus a Public Health Emergency of International Concern (PHEIC), as enshrined in the IHR.[29] In particular, Article 1 of the IHR defines a PHEIC as "an extraordinary event which is determined, as provided in these Regulations: (*i*) to constitute a public health risk to other States through the international spread of disease and (*ii*) to potentially require a coordinated international response".

On 3 February 2020, the WHO issued a specific action plan for governments, the "Strategic Preparedness and Response Plan", containing measures needed to address the emergency. Specifically, the plan aimed to: 1) coordinate action across regions to assess, respond to, and mitigate risks; 2) improve country preparedness

[28] We can argue how the international health commitments extend to human rights law, with the IHR (Art. 3) requiring that domestic implementation "shall be with the full respect for the dignity, human rights and fundamental freedoms of persons". On this argument, see GOSTIN, L. O.; HABIBI, R.; MEIER, B. M. Has global health law risen to meet the covid-19 challenge? Revisiting the international health regulations to prepare for future threats. *The Journal of Law, Medicine & Ethics*, v. 48, n. 2, p. 376-381, 2020. DOI: 10.1177/1073110520935354.

[29] On the reform of the IHR, see GOSTIN, L. O. *et al*. International infectious disease law. Revision of the World Health Organization's international health regulations. *Health Law and Ethics*, 291, 21, 2.361, 2004. DOI: 10.1001/jama.291.21.2623. For the WHO's response to a previous pandemic, e.g. SARS, see DAVIES, S. E.; KAMRADT-SCOTT, A.; RUSHTON, S. *International norms and global health security*. Baltimore: Johns Hopkins University Press, 2015. p. 43-73; FIDLER, D. P. *SARS, governance and the globalization of disease*. London: Palgrave Macmillan, 2004.

and response; 3) accelerate research and development.[30] Lastly, on 11 March 2020, the Director-General issued the pandemic declaration.[31]

Against this backdrop, this Section considers the main criticisms leveled at the WHO and seeks to explain them in the light of the current legal framework and the latitude of the administrative powers accorded to the WHO.

We have seen that the main criticisms focused on the lack of transparency,[32] as well as on the slow response to the outbreak's spread,[33] the urgent need for "political cooperation"— as distinct from coordination activities,[34] and also on the "light touch" approach to the Chinese government[35] or on the absence of sanctions for Member States breaching IHR provisions.[36]

Conceivably, it could be argued that although the first outbreak was reported in late December 2019, the WHO was ineffective in responding to the emergency. Indeed, as we have seen, the Director-General did not declare a PHEIC until 31 January 2020 even though the Emergency Committee had already been convened on 23 January 2020,[37] viz., when the criteria for declaring a PHEIC had been

[30] WHO – WORLD HEALTH ORGANIZATION. Strategic preparedness and response plan. 2021, Available at: https://www.who.int/publications/i/item/WHO-WHE-2021.02. Access on: August 8, 2022.

[31] WHO – WORLD HEALTH ORGANIZATION. Director-General's opening remarks at the mission briefing on covid-19. 2020. Available at: https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19—12-march-2020. Access on: August 8, 2022.

[32] JANSEN, O. Increasing the legitimacy of the World Health Organization. *The Regulatory Review* [*on-line*], [*s. l.*], 2020. Available at: https://www.theregreview.org/2020/04/22/jansen-increasing-legitimacy-world-health-organization/. Access on: August 8, 2022.

[33] See DURRHEIM, D. N. *et al*. When does a major outbreak become a public health emergency of international concern? *Lancet Infectious Diseases*, v. 20, p. 887-889, 2020. See also COVID-19: make it the last pandemic. May 2021. *The Independent Panel for Pandemic Preparedness and Response*, [2021]. Available at: https://theindependentpanel.org/mainreport. Access on: August 8, 2022; and WISE, J. Covid-19: global response was too slow and leadership absent, report finds. *British Medical Journal*, 373, 2021. Available at: https://doi.org/10.1136/bmj.n1234. Access on: August 8, 2022.

[34] BENVENISTI, E. The WHO-destined to fail?: political cooperation and the covid-19 pandemic. *The American Society of International Law*, v. 114, n. 4, p. 588-597, 2020. DOI: 10.1017/ajil.2020.66. *supra* note 26. Though this argument is well founded and convincing, it does not seem sufficient to explain the actual extent of the WHO's failure. My point is that we have not only a political reason, but a legal one. See also RUGER, J. P. *Global health justice and governance*. Oxford: Oxford University Press, 2018. *supra* note 5, p. 247-248. Ruger emphasizes that WHO is weakened institution, riddled with budgetary problems and power politics. In addition, its reputation, effectiveness, and legitimacy have diminished greatly. In fact, WHO's failing in addressing the 2014 West African Ebola outbreak shown that it lacks an emergency operation culture and the capacity to prevent and contain pandemics.

[35] YI-CHONG, X.; WELLER, P. International organizations and state sovereignty: the World Health Organization and covid-19. *Social Alternatives*, v. 39, n. 2, 2020. *supra* note 14, 50. We do not intend here to diminish the possible responsibilities of the WHO, nor of States Parties such as China, but rather to show that these responsibilities depend significantly on the current architecture of the international legal system set up by the IHR.

[36] See ALVAREZ, J. E. The WHO in the age of the coronavirus. *N.Y. Univ. Sch. of L. Pub. Pol'y & Legal Theory Paper Series Working Paper*, 20-30, 9, 2020.

[37] WHO – WORLD HEALTH ORGANIZATION. Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV). 2020. Available at: https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov). Access on: August 8, 2022.

met.[38] And yet, we know that the doctrine of International Law holds that the PHEIC is the main legal tool, along with the pandemic declaration, empowering the Director-General to exercise the function of "international public authority".[39]

Further flaws were identified by those who noted that countries either delayed or did not implement the administrative containment and mitigation measures recommended by the WHO following the PHEIC.[40]

These and other criticisms offer an opportunity to analyze some of the key norms on the administrative powers that WHO can exercise as an authority in charge of managing emergencies. For this purpose, exploring the regulatory power to determine a PHEIC granted by the IHR is crucial to understanding the role and responsibility of this authority.[41]

To do so, we can look at the IHR as offering a comprehensive legal framework for coordinating disease detection, reporting and response at the global level.[42]

In this regard, Article 12(1) IHR states that the WHO's Director-General "shall determine [...] whether an event constitutes a public health emergency of international concern" according to the criteria and the procedure laid down in the IHR. However, Article 12(2) specifies that before doing so, the Director-General "shall consult with the State Party in whose territory the event arises regarding this preliminary determination". In fact, at the level of administrative action, the WHO does not generally commence an *ex officio* proceeding to ascertain whether there are facts leading to a PHEIC declaration. Rather, it is up to the State Parties to notify the WHO of the existence of a potential PHEIC within 24 hours (Article 6 IHR).

Furthermore, in determining the public emergency the Director-General acts "on the basis of the information" received from "the State Party within whose territory

[38] DURRHEIM, D. N. *et al*. When does a major outbreak become a public health emergency of international concern? *Lancet Infectious Diseases*, v. 20, p. 887-889, 2020. *supra* note 32.

[39] VILLAREAL, P. A. Pandemic declarations of the World Health Organization as an exercise of international public authority: the possible legal answers to frictions between legitimacies. *Göttingen Journal of International Law*, v. 7, n. 1, p. 95-129, 2016.

[40] JANSEN, O. Administrative law rules and principles in decision-making of the World Health Organization during the covid-19 pandemic. *Administrative Law Review*, v. 73, n. 1, 2021. p. 183-185. Jansen noted that "[t]he WHO has issued several temporary recommendations regarding COVID-19 that the addressee states have not consistently complied with".

[41] GOSTIN, L. O. *et al*. The international health regulations 10 years on: the governing framework for global health security. *Lancet*, 386, 2.222, 2015. See also FIDLER, D. P. *SARS, governance and the globalization of disease*. London: Palgrave Macmillan, 2004. p. 32, where it is said that the IHR are "the only set of international legal rules binding on WHO member States concerning the control of infectious disease".

[42] BRUEMMER, E.; TAYLOR, A. L. Institutional transparency in global health law-making. *supra* note 13, 277-280. The authors argue that the objective of the IHR is to develop a framework for national policies and global cooperation to manage potential health emergencies of international concern and to provide resources of the international community to dealt with such emergencies. To this end, Art. 2 "provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade".

an event is occurring", in accordance with the combined provisions of Articles 12(2) and 12(4) (a).

In addition, Article 12(2) clarifies that the Director-General and the State Party should be "in agreement" regarding the PHEIC determination. If they are, the Director-General issues "appropriate temporary recommendations" (Article 15-18 IHR) by seeking the "views" of the Emergency Committee. Lastly, according to Article 12(3), if no consensus is reached between the Director-General and the State Party within 48 hours, a determination shall be made pursuant to Article 49 IHR.

Part IX, Chapter II (Articles 48-49) of the IHR provides for the composition and procedures of the Emergency Committee. Regarding the composition, pursuant to Articles 47(1) and 48(2), the Emergency Committee must be composed of experts in all relevant fields of expertise (the "Expert Roster") selected by the Director-General. In particular, the Emergency Committee has an important role in providing its own views on three important issues: *i*) whether an event is a PHEIC; *ii*) deciding on the duration and therefore termination of the PHEIC; *iii*) proposing temporary recommendations as well as requesting their modification, extension or termination.

However, interpreting the provisions of this part of the IHR, we can argue that even here International Law regards the State Party as having an important role in the decision-making process of determining a PHEIC. In fact, Article 48(2) clarifies that "[a]t least one member of the Emergency Committee should be an expert nominated by a State Party within whose territory the event arises". In addition, pursuant to Article 49(4), the same State Party may present its views to the Emergency Committee. In this connection, the State Party may submit temporary recommendations to the Director-General or propose the termination of a PHEIC [Article 49(7)].

Focusing on administrative emergency response measures, we can argue that even the recommendations issued by the WHO need to be "shared" with Member States before being implemented. With this in mind, the factors to be considered when "issuing, modifying or terminating temporary or standing recommendations" listed in the "[c]riteria for recommendations" set out in Article 17 IHR start with "the views of the States Parties directly concerned".

During the last pandemic, we learned that the State Party has a key role in the PHEIC administrative procedure in terms of sharing crucial information with the WHO and thus contributing to the correct determination of a global health emergency.

Arguably, sharing information is a challenge for effective emergency management. This is especially true in view of the fact that the WHO lacks power to impose sanctions for breaches of sharing information committed by States Parties.[43] The power to

[43] See VILLARREAL, P. A. The 2019-2020 novel coronavirus outbreak and the importance of good faith for international law. *Völkerrechtsblog*, January 2020. DOI: 10.17176/20200128-225858-0, who suggests "[r]evisiting the importance of good faith for international law" as a possible solution to ineffective information sharing between the WHO and States Parties.

determine a PHEIC is indeed largely dependent on the information submitted by the State Party, while the WHO does not enjoy sufficient freedom to consider other non-governmental sources.

Admittedly, the WHO can consider other sources of information (so-called "reports") according to Article 9 IHR. Nevertheless, reasonable arguments on the ineffectiveness of verifying sources aside,[44] this power is significantly limited by the Article's provision that "before taking any action based on such reports, WHO shall consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring". Furthermore, it is reasonable to assume that countries where a health emergency is occurring tend to take their time in passing on information that could be counterproductive to their interests, especially with regard to the economic consequences that may result from the PHEIC declaration.

My point is that looking at the architecture of the administrative powers granted to the WHO by the Constitution and IHR has been fruitful in appreciating how this authority is conceived in international law. We are quite aware of the legal limits that this authority faces in dealing with emergencies, and thus can make some suggestions for addressing the WHO's weaknesses.

4 Conclusion

In the light of the analysis of the legal framework, we would be inclined to think that the main weaknesses are due only to the limited administrative powers conferred on the WHO by international law. However, if we turn our attention to understanding why international norms like the Constitution and the IHR have devised such limitations, we can see that concerns about the intensity of powers are, in the main, unfounded.

I suppose that giving more "intrusive" powers to the WHO entails the risk of unbalancing the relationship between protecting public health and safeguarding other legally protected interests of individuals (e.g., liberty, privacy, property). By contrast, I argue that international norms have designed the WHO to be an organization that exercises administrative powers in a non-authoritarian manner[45] in order to achieve the highest possible level of health for all people, without undermining other legally protected interests. To do so, I suggest it needs "sharing powers" with States Parties rather than more "intrusive powers" over States Parties.[46]

[44] GOSTIN, L. O. *et al*. US withdrawal from WHO is unlawful and threatens global and US health and security. *Lancet*, 396, 293, 2020.

[45] See *supra* note 4.

[46] In administrative law doctrine, see VESE, D. Managing the pandemic: the Italian strategy for fighting covid-19 and the challenge of sharing administrative powers. *European Journal of Risk Regulation*, 5, 2020. DOI: 10.1017/err.2020.82.

Sharing powers –and more precisely administrative powers–[47] means here that the WHO implements measures and strategies for managing the emergency in agreement with the States Parties, i.e., through the participation in proceedings of all institutional actors involved in emergency management.[48]

I claim that one of the WHO's main weaknesses in managing emergencies, viz., the slow or ineffective determination of the PHEIC, is due to a lack of or ineffective sharing of administrative power.

This means that the decision-making process whereby the authority chooses a measure and more generally an administrative strategy for managing an emergency should be exercised with the participation of the States Parties (governments and national health authorities), specifically by sharing information, documents and data that are essential for achieving this purpose effectively.

As we have seen, administrative powers were poorly shared during the pandemic, as China failed to provide adequate and timely information, data and documents needed to make the decision-making process effective in managing the emergency.

The need for sharing powers rather than authoritative ones poses a challenge to the future role of the WHO as we move towards the "era of pandemics".[49]

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[47] In the context of a health emergency, the sharing of administrative powers plays a crucial role both in managing the pandemic effectively and in avoiding undermining people's rights. The sharing of administrative powers implies that institutional actors in emergency response need to share policies and strategies to achieve effective public health outcomes while minimizing restrictions to individual rights. This meaning complies with the definition of public health law. According to GOSTIN, L. O.; WILEY, L. F. *Public health law*: power, duty, restraint. 3rd ed. Oakland: University of California Press, 2016. *supra* note 3, p. 5. A theory of public health law can be defined as "the state's legal powers and duties to assure the conditions for people to be healthy, and limits on the state's power to constrain individual rights". Limiting the powers of the state to restrict people's legally protected interests is a great challenge for public health law.

[48] The theory of the participation of institutional actors and persons in the administrative procedure –of which my argument on the "sharing of administrative powers" is a development, is argued by some prominent scholarships in the doctrine of Italian administrative law. In this regard, I refer to BENVENUTI, F. *Il nuovo cittadino*: tra libertà garantita e libertà attiva. Venezia: Marsilio, 1994. (*The new citizen*: between guaranteed freedom and active freedom); PASTORI, G. *La procedura amministrativa*. Vicenza: Neri Pozza, 1964. (*The administrative procedure*), PERFETTI, L. R. (ed.). *Le riforme della l. 7 agosto 1990, n. 241 tra garanzia della legalità ed amministrazione di risultato*. Padova: CEDAM, 2008. (*The reforms of Law No 241 of 7 August 1990 between guarantee of legality and result-oriented administration*).

[49] See the Editorial 'A pandemic era'. *The Lancet Planetary Health*, v. 5, n. 1, 2021. DOI: 10.1016/S2542-5196(20)30305-3.

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